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WISCONSIN COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001341

State of Wisconsin ex rel. Peggy A. Lautenschlager,

Petitioner-Appellant,

v.

Actavis Mid Atlantic, LLC, Actavis Elizabeth LLC, Par Pharmaceuticals Company, Teva Pharmaceuticals USA, Inc., Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc.,

Defendants-Respondents.

Appeal from a Final Judgment of the Circuit Court of Dane County, the Honorable Juan B. Colas Presiding, Circuit Court Case No. 2016CV001262

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INTRODUCTION

When the Wisconsin legislature repealed the False Claims for Medical Assistance Act (the "FCMAA" or the "Act") in 2015, it expressly preserved only those "actions filed before the effective date" of repeal. Thus, no action could be initiated under the FCMAA on or after July 14, 2015.

Peggy Lautenschlager, the petitioner-appellant here and former Attorney General, once understood this. When the legislature enacted the repeal, Lautenschlager was facing a motion to dismiss the second of the *qui tam* lawsuits she had brought under the FCMAA against the defendant drug manufacturers. The circuit court denied the motion, and the defendants petitioned this Court for interlocutory review. Lautenschlager, in opposing the petition, candidly acknowledged the impact of the repeal on her case: "only those actions filed before the effective date of repeal . . . can

proceed," she told this Court. Record ("R.") 33 at 64. Thus she agreed with the defendants' assertion that the dismissal of her complaint "would terminate these proceedings for good." R. 33 at 28.

This Court granted review, and it ordered that her second *qui tam* lawsuit be dismissed. R. 33 at 73–74. But that decision apparently did not "terminate these proceedings for good." That's because Lautenschlager chose instead to try again.

Lautenschlager filed this *qui tam* lawsuit—her third—on May 11, 2016, adopting a new stance directly in conflict with her prior assertion. The repealing legislation, she now alleges, did not satisfy Wisconsin's general savings statute, Wis. Stat. § 990.04: it "did not specially and expressly remit, abrogate or do away with" her claims under the FCMAA. Petitioner-Appellant's Appendix ("App.") at 9.

That position is untenable. It disregards the legislature's clear intent, ignores the repeal act's language and structure, and defies common sense. The defendants accordingly moved to dismiss this lawsuit on the basis that it was foreclosed by the FCMAA's repeal. The circuit court agreed and dismissed this lawsuit with prejudice, a decision which Lautenschlager now appeals.

Act 55 "specially and expressly" abrogated this and all other causes of action filed on or after July 14, 2015. The legislature preserved the FCMAA only as to lawsuits filed before the repeal, and it eliminated all statutory traces of the Act for subsequently filed actions. The general savings statute has never been used to override such clear intent as to the effect of a repeal. This appeal is meritless. The circuit court's judgment should be affirmed.

The judgment may also be affirmed for a second reason: the general savings statute does not even apply to this

action because Lautenschlager never "accrued" a right to bring this claim in the first place. That right belongs to the State, not any individual relator. Thus, the savings statute cannot "save" this or any other claim filed on or after July 14, 2015.

STATEMENT OF ISSUES FOR REVIEW

Lautenschlager poses one issue for review. Defendants-respondents restate this question to more precisely capture the issue before this Court, and also present a second question for review.[1]

1. Does the legislature's repeal of the FCMAA as to all actions other than those filed before July 14, 2015, bar Lautenschlager's claim filed in 2016?

Answered by the Circuit Court: Yes.

[1] The second question concerns an error by the circuit court that, if corrected, would sustain the judgment. Such a question is properly raised in the defendants-respondents' brief. *See State v. Alles*, 106 Wis. 2d 368, 389–90, 316 N.W.2d 378 (1982).

2. Did a right of action under the FCMAA accrue in Lautenschlager's favor prior to its repeal, triggering the application of the general savings statute, Wis. Stat. § 990.04?

Answered by the Circuit Court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendants-respondents do not deem oral argument to be necessary here because the issues should be adequately addressed through the briefs. Publication may be warranted to establish that no other claims under the FCMAA may be filed post-repeal, and to clarify the application of Wisconsin's general savings statute, Wis. Stat. § 990.04.

STATEMENT OF THE CASE

This appeal arises from the legislature's repeal of the False Claims for Medical Assistance Act, Wis. Stat. § 20.931

(2013–14).[2] At this juncture, the substance of the FCMAA is important only for purposes of understanding its repeal.

The FCMAA was enacted in 2007 and patterned after the federal False Claims Act, 31 U.S.C. §§ 3729–3733. *See* 2007 Wis. Act. 20, sec. 635 (creating "20.931 of the statutes").[3] The statute did not prohibit previously lawful conduct. Rather, it established a new mechanism for deterring certain kinds of false claims, in two respects. First, it authorized penalties applicable to "any person" who "[k]nowingly presents or causes to be presented" to the State "a false claim for medical assistance," among other offenses.

[2] References to section 20.931 immediately prior to its 2015 repeal are to the 2013–14 edition of the Wisconsin Statutes—the last edition of the statutes in which the FCMAA appeared. No substantive amendments were made to the FCMAA between its 2007 passage and its 2015 repeal. *But see* 2011 Wis. Act 257, sec. 8 (correcting a typographical error in Wis. Stat. § 20.931(18)). Citations to other statutes are to the 2015–16 edition, which was in force at the time this action was filed.

[3] *See* Wis. Stat. § 20.931(18) (2013–14) ("This section shall be liberally construed and applied to promote the public interest and to effect the congressional intent in enacting 31 USC 3729 to 3733, as reflected in the act and the legislative history of the act.").

Wis. Stat. § 20.931(2) (2013–14). Second, it empowered private citizens, as *qui tam* plaintiffs or "relators," to bring claims under the FCMAA on behalf of the State—in exchange for a portion of the recovery. Wis. Stat. § 20.931(5), (11).

The two authorities central to this appeal are 2015 Act 55 ("Act 55"), which repealed the FCMAA, and Wisconsin's general "savings statute," Wis. Stat. § 990.04 (2015–16). According to Lautenschlager, the latter governs the interpretation of the former. Act 55 provided that "20.931 of the statutes"—the FCMAA—"is repealed," and specified that the repeal "does not apply to actions filed before the effective date of this subsection." 2015 Wis. Act 55, secs. 945n, 9318(3f). The general savings statute preserves rights of action accrued under a repealed statute "unless specially and expressly remitted, abrogated or done away with by the repealing statute." Wis. Stat. § 990.04.

This lawsuit was preceded by the filing of three others by Lautenschlager, first as Attorney General (in 2004) and then as a private "relator" (in 2011 and 2014). The latter two lawsuits were brought pursuant to the FCMAA, which was enacted in 2007 and repealed in 2015. Lautenschlager initiated the current action—her third under the FCMAA, and fourth overall—in 2016, following the statute's repeal.

2004 – Wisconsin AWP Litigation. As Attorney General, Lautenschlager in 2004 sued approximately three dozen drug companies on behalf of the State. R. 28 at 2–4; *see State v. Abbott Labs.*, No. 04-cv-1709 (Wis. Cir. Ct. Dane Cty. June 3, 2004). The defendants, Lautenschlager alleged, had published false pricing information for their drugs, which caused the State's Medicaid program to overpay for those drugs. R. 28 at 4–5. Lautenschlager left office in 2007, but the litigation continued for another decade. *See, e.g.*, *State v.*

Abbott Labs., 2012 WI 62, ¶ 1, 341 Wis. 2d 510, 816 N.W.2d 145. That case concluded in March of this year.

2007 – Enactment of FCMAA. During her final year in office, Lautenschlager promoted the passage of the False Claims for Medical Assistance Act—which was enacted the following year, in 2007. *See* 2007 Wis. Act. 20, sec. 635 (creating Wis. Stat. § 20.931); *see also* R. 34 at 4–8.

2011 – First *Qui Tam* Lawsuit. In 2011, Lautenschlager, by then a private citizen, initiated her first *qui tam* lawsuit under the FCMAA—a precursor to this one. *See State ex rel. Lautenschlager v. Actavis Mid-Atlantic, LLC*, No. 11-cv-5544 (Wis. Cir. Ct. Dane Cty. Dec. 20, 2011) (the "2011 Lawsuit"); R. 30 at 24–38. The complaint advanced allegations largely identical to those she had asserted as Attorney General, and expressly touted Lautenschlager's history litigating such claims for the State. R. 30 at 26.

The difference is that Lautenschlager sued a new group of defendants, and she stood to personally profit if she prevailed. That is because Lautenschlager and her law firm, Bauer & Bach, named themselves as the *qui tam* plaintiffs or "relators." R. 30 at 26–27. Among the items of relief they requested was to award Lautenschlager and Bauer & Bach "their appropriate share of the proceeds of this action," as well as "their reasonable expenses, costs, and attorneys' fees as provided by law." R. 30 at 37.

The 2011 Lawsuit ultimately was dismissed on June 12, 2014 because the relators, after several attempts, failed to plead fraud with the particularity required by Wisconsin law. R. 31 at 37–38, 44–49.

2014 – Appeal of 2011 Lawsuit. On May 16, 2014, before the entry of judgment, Lautenschlager and Bauer & Bach appealed the dismissal of the 2011 Lawsuit. R. 31 at

39–43. They withdrew that appeal on September 22, 2014. R. 32 at 1–4.

2014 – Second *Qui Tam* Lawsuit. On August 11, 2014, while the appeal of the 2011 Lawsuit was still pending, Lautenschlager and Bauer & Bach filed a new suit under the FCMAA, bringing the same claims against the same group of drug companies. *See State ex rel. Lautenschlager v. Actavis Mid-Atlantic, LLC*, No. 14-cv-2293 (Wis. Cir. Ct. Dane Cty. Aug. 11, 2014) (the "2014 Lawsuit"); R. 31 at 50–92. On May 28, 2015, the defendants moved to dismiss the 2014 Lawsuit on several grounds, including the relators' violation of the FCMAA's "first-to-file" rule—which prohibits the filing of an FCMAA action while a related action is pending. R. 32 at 5–68. The defendants argued that the still-pending appeal of the 2011 Lawsuit barred the relators from filing a new action. R. 32 at 30–33. On November 24, 2015, the

circuit court rejected that and other arguments and denied defendants' motions to dismiss. R. 32 at 69–84.

2015 – Repeal of FCMAA. On July 12, 2015, the legislature enacted Act 55, which repealed the FCMAA, allowing only "actions filed before the effective date of this subsection" to proceed. *See* 2015 Wis. Act 55, secs. 945n, 9318(3f). Act 55 became effective on July 14, 2015, before the circuit court ruled on defendants' motion to dismiss the 2014 complaint.

2015–16 – Appeal of 2014 Lawsuit. After the circuit court denied their motion to dismiss, the defendants on December 8, 2015 filed a petition for interlocutory review based only on the circuit court's refusal to apply the "first-to-file" rule. *See State ex rel. Lautenschlager v. Actavis Mid-Atlantic, LLC*, No. 15-AP-2498 (Wis. Ct. App. Dec. 8, 2015); R. 33 at 1–36. In her response to the petition for review, Lautenschlager advised that the legal question presented "has

no ramifications outside this case," because "only those actions filed before the effective date of repeal . . . can proceed." R. 33 at 53, 64.

On January 12, 2016, the Court of Appeals granted the defendants' petition and, on its own motion, summarily reversed the circuit court—concluding that "the case must be dismissed because it was filed while the plaintiffs' first case was still pending, in violation of Wis. Stat. § 20.931(5)(e)." R. 33 at 69–74. The case was remanded to the circuit court, which dismissed the 2014 Lawsuit. R. 34 at 1–3.

2016 – Third *Qui Tam* Lawsuit. Lautenschlager[4] filed this action on May 11, 2016, again under the FCMAA, despite its repeal nearly a year earlier (the "2016 Lawsuit"). App. at 4–48 (R. 1 at 1–46). In her complaint, she alleged that Act 55 "did not specially and expressly remit, abrogate or

[4] Bauer & Bach, LLC—the law firm named along with Lautenschlager as a relator in the 2011 Lawsuit and 2014 Lawsuit—dissolved during the pendency of the 2014 Lawsuit. R. 38 at 13.

do away with" her claims under the FCMAA. App. 9 (R. 1 at 6). The defendants moved to dismiss, arguing that (1) Act 55 expressly abrogated all unfiled claims, including this one, and (2) the savings statute was inapplicable because Lautenschlager could not accrue a right to bring a claim under the FCMAA. R. 38 at 1–23. The circuit court agreed as to the first point but not the second, and dismissed the 2016 Lawsuit with prejudice based on the repeal. App. at 1–3 (R. 69 at 1–3).

2017 – Appeal of 2016 Lawsuit. Lautenschlager, as the petitioner-appellant, now appeals from the circuit court's order dismissing this lawsuit with prejudice.

ARGUMENT

The FCMAA created the only cause of action under which Lautenschlager filed the 2011 Lawsuit, the 2014 Lawsuit, and the 2016 Lawsuit. As Lautenschlager

acknowledges, this action cannot proceed in the absence of that statute.

What Lautenschlager disputes is the import of Act 55, the legislation that repealed the FCMAA. Although the repeal was effective before she filed this action, Lautenschlager insists that her right to bring suit survived the repeal. According to Lautenschlager, her right of action had accrued before the repeal, and Act 55 did not—as the savings statute requires—"specially and expressly" abrogate such claims.

The circuit court found that Lautenschlager had accrued a right of action but concluded that it was expressly abrogated by the repeal. The complaint was, therefore, dismissed with prejudice. This Court applies *de novo* review to a circuit court's interpretation of a statute. *Hart v. Artisan & Truckers Cas. Co.*, 2017 WI App 45, ¶ 10, 377 Wis. 2d 177, 900 N.W.2d 610.

The circuit court's judgment should be affirmed because it correctly applied the savings statute to Act 55 in the only way that effectuated the legislature's manifest intent. Act 55 "abrogated all causes of action except those already filed and thus satisf[ied] the requirement of § 990.04." App. at 3 (R. 69 at 3). The dismissal should also be affirmed for a second reason: Wis. Stat. § 990.04 does not even apply because Lautenschlager herself had no accrued right to bring this claim in the first place.

I. The Legislature Expressly Abrogated All FCMAA Actions That, Like This One, Were Not Filed Before the Repeal.

A. Act 55 Announced the Legislature's Intent to Preserve Only Filed FCMAA Actions and to Abrogate All Others.

Act 55 spells out in exacting detail when and how its provisions became effective. Except as to "actions filed before" July 14, 2015, the False Claims for Medical Assistance Act was repealed. For "actions filed *after*" that

date, all statutory references to section 20.931 were deleted—eliminating the legal architecture that supported FCMAA claims. Act 55 therefore expressly abrogated all claims under section 20.931 except for those "filed before" its "effective date." *See Marotz v. Hallman*, 2007 WI 89, ¶ 18, 302 Wis. 2d 428, 734 N.W.2d 411 ("In interpreting a statute, courts give effect to every word so that no portion of the statute is rendered superfluous.").[5]

Lautenschlager initiated the 2016 Lawsuit after Act 55's effective date. There is no workable way to read Act 55 as having preserved this claim. As a matter of law, the cause of action under the FCMAA no longer existed when this action was filed on May 11, 2016.

[5] When the application of a new statute is questioned, courts "begin by examining whether the text of the [statute] . . . hold[s] the answer." *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 36, 302 Wis. 2d 299, 735 N.W.2d 1. "As in all instances when our inquiry centers on a statute, our primary objective is to ascertain and give effect to the intent of the legislature." *Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 632, 547 N.W.2d 602 (1996).

Before its repeal, the FCMAA was codified at section 20.931 of the Wisconsin Statutes. Cross-references to section 20.931 appeared throughout the statutes. For example, Wisconsin's Rules of Civil Procedure provided that an "action filed under s. 20.931 may be dismissed only by order of the court." *See* Wis. Stat. § 805.04(2m) (2013–14) (advising the court to "take into account the best interests of the parties and the purposes of s. 20.931" in ruling on dismissal). Other statutes created a ten-year statute of limitations for FCMAA claims, *see* Wis. Stat. § 893.981 (2013–14), and empowered the state Department of Justice to "[d]iligently investigate possible violations of s. 20.931" and bring "a civil action," Wis. Stat. § 165.25(11) (2013–14).

To eliminate the FCMAA, therefore, Act 55 had to do more than state that section 20.931 was repealed—although it certainly did that. The legislation also identified the claims

that survived repeal and amended other provisions of Wisconsin law to remove references to the FCMAA.

The repeal itself appeared at section 945n of Act 55, which states: "20.931 of the statutes is repealed." 2015 Wis. Act 55, sec. 945n. To "repeal" means to "[a]brogat[e] . . . an existing law by express legislative act." Black's Law Dictionary 1490 (10th ed. 2014). To "abrogate," in turn, is to "do away with," "abolish," and "annul." American Heritage Dictionary 6 (4th ed. 2006). Thus, Act 55 abrogated, abolished, and did away with the FCMAA.

The repeal's effect was set out in a later provision of Act 55, section 9318, entitled "Initial applicability; Health Services." It provides as follows:

> (3f) QUI TAM CLAIMS FOR FALSE CLAIMS FOR MEDICAL ASSISTANCE.
>
> (a) ***The treatment of sections 20.931***, 165.25 (11), and 893.981 of the statutes ***does not apply to actions filed before the effective date*** of this subsection.

> (b) The treatment of sections 165.08, 801.02 (1), 803.09 (1) and (2), 804.01 (2) (intro.), and 805.04 (1) and (2m) of the statutes ***first applies to actions filed after the effective date*** of this subsection.

2015 Wis. Act 55, sec. 9318(3f)(a), (b) (emphasis added).

The "treatment" of section 20.931 could refer only to its repeal. Therefore, Act 55 specified that section 20.931's repeal "does not apply to actions filed before the effective date of this subsection." For everything else—all actions not filed by the effective date—the repeal applied. That can be understood no other way.

That conclusion is reinforced by other provisions of Act 55. The legislature also repealed sections 165.25(11) and 893.981—which assigned investigative duties to DOJ and set the limitations period. *See* 2015 Wis. Act 55, sec. 3504c. ("165.25 (11) of the statutes is repealed."), sec. 4639g. ("893.981 of the statutes is repealed."). Subpart (3f)(a) of the "Initial applicability" section provided that the "treatment of"

these two sections would "not apply to actions filed before the effective date of this subsection." 2015 Wis. Act 55, sec. 9318(3f)(a). Like section 20.931 itself, these ancillary provisions survived only for *filed* actions; otherwise, they were repealed.

Most importantly, subpart (3f)(b) stated that several other amendments—which eliminated statutory cross-references to section 20.931—would "first appl[y] to actions filed *after* the effective date of this subsection." 2015 Wis. Act 55, sec. 9318(3f)(b) (emphasis added). These cross-references carved out exceptions to Wisconsin's procedural rules to account for special features of *qui tam* litigation. For example, a civil action is ordinarily initiated by filing a summons and complaint and serving an authenticated copy on the defendant. *See* Wis. Stat. § 801.02(1) (2015–16). Section 20.931 was formerly exempted from that rule to allow FCMAA actions to be filed under seal and served on the

Attorney General. *See* Wis. Stat. § 801.02(1) (2013–14); *see also* Wis. Stat. § 20.931(5)(b) (2013–14). Act 55 eliminated this exception, providing:

> 801.02 (1) of the statutes is amended to read:
>
> 801.02 (1) ~~Except as provided in s. 20.931(5)(b), a~~ A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court . . .

2015 Act 55, sec. 4610f. This amendment and several others[6] would apply to any actions "filed after the effective date of" Act 55. 2015 Wis. Act 55, sec. 9318(3f)(b). Thus, the related statutory provisions that made FCMAA claims possible

[6] Act 55 also removed exceptions related to the Attorney General's ability to settle claims, 2015 Wis. Act 55, sec. 3501p (amending Wis. Stat. § 165.08); a person's ability to intervene in a lawsuit, 2015 Wis. Act 55, sec. 4610g & 4610j (amending Wis. Stat. §§ 803.09(1) & (2)); and the scope of discovery, 2015 Wis. Act 55, sec. 4610n (amending Wis. Stat. § 804.01(2) (intro.)). Under subpart (3f)(b), these amendments would all apply to "actions filed after the effective date" of repeal. Act 55's repeal of section 805.04(2m), governing the dismissal of FCMAA claims, also applied only to actions filed *after* the repeal's effective date. *See* 2015 Wis. Act 55, sec. 4610r ("805.04(2m) of the statutes is repealed.") & sec. 9318(3f)(b).

would not exist for claims filed after the repeal went into effect.

The legislative text and structure leave no question as to the effect of Act 55: an action's filing date dictated the effect of repeal. For actions filed before the effective date, the FCMAA remained in place. For actions filed after the effective date, the FCMAA was abolished, along with all statutory exceptions and cross-references that supported such claims.

Because Lautenschlager filed this lawsuit on May 11, 2016, after the July 14, 2015 effective date of repeal, she sought relief based on a statute that no longer existed. Her case was properly dismissed.

B. The Savings Statute Has Never Been Applied to Defy Such Clear Legislative Intent.

Lautenschlager relies on section 990.04 to call into question the plain meaning of Act 55. Section 990.04 is

Wisconsin's general "savings statute." Under common law, a repeal would "obliterate the statute repealed as completely . . . as if it had never been passed." *Dillon v. Linder*, 36 Wis. 344, 349 (1874). Section 990.04 modifies that rule, thereby "saving" certain claims from repeal. *See Truesdale v. State*, 60 Wis. 2d 481, 487, 210 N.W.2d 726 (1973). "The language in sec. 990.04 requires a strong showing of intent." *Id.* at 489. The savings statute cannot be used to upend the legislature's "strong showing of intent" in repealing the FCMAA.

Section 990.04 is titled "Actions pending not defeated by repeal of statute," and it provides as follows:

> The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or ***rights of action accrued*** under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such statute, liability

> wherefore shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless ***specially and expressly remitted, abrogated or done away with*** by the repealing statute.

Wis. Stat. § 990.04 (emphasis added). In short, under section 990.04, a "right of action accrued" under a repealed statute "shall be preserved and remain in force . . . unless specially and expressly remitted, abrogated or done away with by the repealing statute."

Lautenschlager argues that Act 55 does not satisfy this standard; it "does not expressly abrogate accrued rights of action" under the FCMAA, and so her claim survives. Pet'r Br. at 11. Act 55 was, according to Lautenschlager, "silent as to the effect of the repeal on accrued causes of action that had not yet been filed." *Id.* at 14. "[S]ilence is not an express abrogation," she asserts, and "an implicit abrogation of a cause of action is no abrogation at all." *Id.*

Nothing about the FCMAA's repeal or its impact is implicit, however. As explained in the prior section, *see supra* at 16–23, the legislature gave detailed instructions as to when and how every provision of the repeal would take effect. Act 55 cannot be reconciled with the preservation of a claim filed after the effective date of repeal.

Lautenschlager does not identify a single case in which such obvious legislative intent was overridden for failing to satisfy the "specially and expressly" standard. As Lautenschlager notes, Pet'r Br. at 13, section 990.04 was intended to prevent "the *mere repeal* of a statute from defeating existing rights." *Miller v. Chicago & N.W.R. Co.*, 133 Wis. 183, 189, 113 N.W. 384 (1907) (emphasis added). However, Act 55 was not a "mere repeal": it explicitly set out the repeal's effect.

This case is unlike, therefore, the repeal addressed in *Niesen v. State*, where a cause of action endured because a

"*careful examination*" of the repealing statute failed "to disclose *any language* which *can fairly be construed* to reflect the legislature's intention to terminate rights of action which had accrued . . . prior to . . . repeal." 30 Wis. 2d 490, 493–94, 141 N.W.2d 194 (1966) (emphasis added). By contrast, Act 55 *does* contain language that "can fairly"—and only—"be construed to reflect the legislature's intention" to foreclose unfiled claims.

Lautenschlager suggests how the legislature could have done this better. The legislature could "have tracked the text of § 990.04," she proposes, "by writing in the repeal act that 'all causes of action not filed before the effective date of the repeal act are specially and expressly remitted, abrogated or done away with.'" Pet'r Br. at 15. This alternative is simply a mirror image of what the legislature in fact did say. Instead of repealing the statute and declaring that filed actions are saved, as Act 55 did, Lautenschlager's proposal declares

that unfiled actions are abrogated—they are, in other words, repealed. Lautenschlager's proposed alternative shifts words without changing meaning.

The meaning of Act 55 is unmistakable: it eliminates all claims under the FCMAA except those filed prior to repeal. The circuit court's ruling thus should be affirmed.

II. The Savings Statute Does Not Apply Because No Right of Action Had Accrued in Lautenschlager's Favor.

There is another reason the judgment of the circuit court should be affirmed. The general savings statute, on which Lautenschlager predicates her entire appeal, does not even apply here. That is because section 990.04 saves only "rights of action" that have already "accrued under" the repealed statute. But a cause of action under the FCMAA could not have accrued in favor of Lautenschlager or any other individual relator. Such claims instead belonged to the State.

In a *qui tam* action, "it is the government, not the individual relator, who is the real plaintiff in the suit." *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995). Nothing illustrates this point as clearly as the structure of the FCMAA itself. Relators had to file their complaints under seal and could not serve the complaint without court approval—which allowed the Attorney General to decide whether to take over the action or pursue some other remedy. Wis. Stat. § 20.931(5)(b), (d) (2013–14). Even if the State declined to intervene, the Attorney General retained the power to settle or dismiss an FCMAA case over a relator's objection. Wis. Stat. § 20.931(7).

No one person could accrue a right to bring an FCMAA claim because the "first-to-file" rule dictated that the filing of one suit barred any other. If a person brought a *qui tam* action, "no person other than the state may intervene or bring a related action while the original action is pending."

Wis. Stat. § 20.931(5)(e) (2013–14). Thus Lautenschlager's 2014 Lawsuit had to be dismissed because it was filed while her first appeal remained pending; Lautenschlager had *no right* to bring that claim at that time. R. 33 at 73–74. Had another relator filed a lawsuit between the dismissal of her 2014 Lawsuit and her initiation of this one in 2016 (notwithstanding the repeal), this action would have been barred for the same reason. Indeed, Lautenschlager had no right to file this action even in the days immediately before repeal: a new lawsuit would have been precluded by the first-to-file rule because the 2014 Lawsuit was pending at the time.

A right of action does not accrue in a vacuum; it accrues in someone's favor. The Wisconsin Supreme Court reinforced this point in *Niesen*: "We conclude that rights which had arisen *in favor of the plaintiff* under sec. 88.38(2), Stats., prior to its being repealed are preserved *to Mr. Niesen* by sec. 990.04." *Niesen*, 30 Wis. 2d at 495 (emphasis added).

A right of action cannot accrue without a plaintiff (or relator) to bring it. *See Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995) ("It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, *and a party with a present right to enforce it*." (emphasis added)). A right accrues when a party can legally enforce it.

The claims in this lawsuit are not, and never were, Lautenschlager's to bring. She certainly could (and did) bring them "standing in the shoes of the government and acting as [a] private attorney[] general." *United States v. Menominee Tribal Enters.*, 601 F. Supp. 2d 1061, 1069 (E.D. Wis. 2009). But she could do so only if she followed the statute, allowed the Attorney General to review her complaint, and filed her lawsuit before anyone else did. A

relator pursues a claim on behalf of the State, subject to delineated statutory prerequisites, for an injury not her own.

Such is not an accrued right.[7] The Wisconsin Supreme Court has made clear that "an unperfected or 'inchoate' right, dependent on future events, is not protected by Wis. Stat. § 990.04." *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 90, 370 Wis. 2d 500, 881 N.W.2d 702. Lautenschlager at best had an inchoate right that had not yet ripened at the effective date of repeal. Her ability to pursue any claim under the FCMAA rested on "uncertain future events" that would

[7] In addition, cases applying federal *qui tam* provisions make clear that a relator has no vested right in his or her claim until the case has reached a final judgment. *See, e.g., Brooks v. Dunlop Mfg., Inc.*, 702 F.3d 624, 632 (Fed. Cir. 2012) ("[A] *qui tam* plaintiff has 'no vested right' and his 'privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered, [i]s an award of statutory creation, which, prior to final judgment, [i]s wholly within the control of Congress."); *Brule Research Assocs. Team, L.L.C. v. A.O. Smith Corp.*, No. 08-1116, 2012 WL 2087345, at *2 (E.D. Wis. June 8, 2012) ("No court has found that the United States took a vested property right from a qui tam plaintiff by eliminating a statutory cause of action . . . ."); *see also Stauffer v. Brooks Bros. Grp., Inc.*, 758 F.3d 1314, 1321 (Fed. Cir. 2014) (dismissing *qui tam* case based on amendment to America Invents Act, enacted post-filing, that imposed a heightened standing requirement on the relator).

not—and could not—occur until after the complaint was filed. *Id.* ¶ 76 (Lands' End's right to higher interest under prior statute was contingent on its actual recovery of a qualifying judgment); *Trinity Petroleum, Inc.*, 2007 WI 88, ¶ 48 (litigant's right to costs and attorney fees under prior version of statute was contingent on circuit court's finding that opponent's action was frivolous).

The FCMAA did not make any previously lawful conduct unlawful. Rather, it created a mechanism to redress certain kinds of fraud. The legislature determined that, effective July 14, 2015, that mechanism is no longer available—a choice that the legislature was certainly entitled to make. "Since the only right of action in the case at bar was given by statute, there can be no question but that the legislature had the power to wholly take it away by statute." *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶ 126 n.38, 285 Wis. 2d 236, 701 N.W.2d 523 (quoting *Daniels v.*

Racine, 98 Wis. 649, 652, 74 N.W. 553 (1898)). "Outside of the statute giving it," Lautenschlager "had no color of right for the action." *Dillon*, 36 Wis. at 349. Since no right of action belonged to Ms. Lautenschlager, section 990.04 does not even apply.

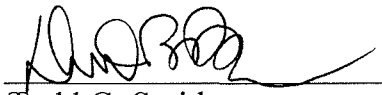
CONCLUSION

Lautenschlager laments that "it would be particularly unjust" for her claim to be dismissed, "considering that she has vigorously litigated this cause of action since 2011." Pet'r Br. at 16. She "did not sit on her rights in asserting a qui tam claim," she says. *Id.* That may be, but her tenacity is irrelevant to the issues on appeal.

The legislature's intent in repealing the FCMAA was clear. It should be respected. Therefore, for the reasons set forth above, defendants-respondents respectfully request that the judgment dismissing this action be affirmed.

Respectfully submitted,

Dated: October 11, 2017



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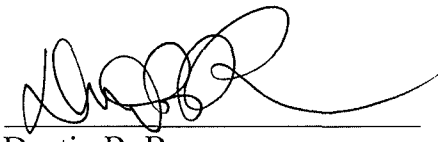
FORM AND LENGTH CERTIFICATION

I hereby certify that this response brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,504 words.

By: 
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this response brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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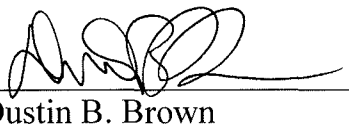
By: 
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CERTIFICATE OF SERVICE

I, hereby certify under penalty of perjury under the laws of the State of Wisconsin that I caused the foregoing Response Brief of Defendant-Respondents to be served on the following counsel of record, by hand-delivery and electronic mail, on October 11, 2017:

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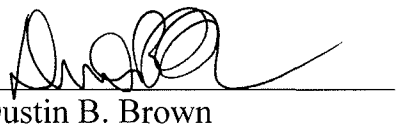
By: 
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